No. 83-1852

In the Supreme Court of the United States

OCTOBER TERM, 1984

KENNETH HARDING MORRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether alleged discrimination against women and blacks in the selection of grand jury foremen provides a basis for seeking dismissal of an indictment returned against a white male by the grand jury.

2. Whether testimony by two psychologists pertaining to petitioner's susceptibility to sexual enticement, offered in support of an entrapment defense, was properly excluded pursuant to Rule 12.2(b) of the Federal Rules of Criminal Procedure because of petitioner's failure to give advance notice of his intention to rely on such testimony.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1A-25A) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 26A-27A) was entered on March 5, 1984. A petition for rehearing was denied on April 4, 1984 (Pet. App. 28A-30A). The petition for a writ of certiorari was filed on May 10, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on three counts of distributing cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to four years' imprisonment on counts 2 and 3 of the indictment, to run concur-

rently with a term of 10 years' imprisonment on count 4.[1] In addition, petitioner received a 3-year special parole term on each count and a fine of $10,000. Pet. App. 14A.

1. The evidence at trial showed that in October 1982, petitioner's former girlfriend, Dianne Mayo, contacted the United States Drug Enforcement Administration (DEA) and offered her assistance in locating drug traffickers. After her approach to the DEA, Mayo began asking petitioner to procure cocaine for herself and a "friend," Julie Williams, who was coming to visit from New York. Mayo told petitioner that Williams was also coming to escape from marital constraints and to "party." "Williams" was in reality Dallas Police Department narcotics investigator Jan Forsyth (Pet. App. 3A-4A).

Petitioner eventually agreed to sell Mayo and Forsyth one-eighth of an ounce of cocaine and met the two women at a coffee shop on November 19, 1982 to consummate the deal. Forsyth paid petitioner $300 for the drug (Pet. App. 4A). Petitioner met the two women again on December 1, 1982 at another restaurant. This time, petitioner took Forsyth for a drive without Mayo and suggested that he and Forsyth meet some time for a drink or go to a restaurant. Forsyth agreed, but also told petitioner that she was staying with her "boyfriend" in Dallas. Forsyth gave petitioner $600 for one-quarter ounce of cocaine. Both parties agreed to exclude Mayo from any future cocaine transactions, and petitioner gave Forsyth his telephone number so that she could contact him directly. Back at the restaurant before Forsyth left petitioner's car, petitioner kissed her on the cheek. Pet. App. 5A-7A.

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[1]Petitioner was acquitted on count 1, which also charged him with distributing cocaine (Pet. App. 13A).

Thereafter, Forsyth called petitioner to arrange for future cocaine transactions. At one meeting in a bar, Forsyth attempted to negotiate another cocaine purchase. Although she again made reference to her boyfriend, petitioner attempted to engage Forsyth in a sexual relationship, inviting her to accompany him to a Carribean Island, and suggesting that they should "go to bed at least as friends" (Pet. App. 8A). Forsyth rebuffed petitioner's advances; however, she was subsequently able to arrange a meeting on December 10, 1982, between petitioner and herself, to be attended by her "boyfriend" (in reality another Dallas police officer). At that meeting, the undercover officers negotiated a purchase of one ounce of cocaine from petitioner. Pet. App. 8A-9A. On December 11, petitioner confirmed that he could provide the pair with one ounce of cocaine for $2,300. The three again met at a coffee shop, where petitioner invited the two officers to go for a drive in his car. After petitioner pulled the car over on a side street, he handed the "boyfriend" a plastic bag containing one ounce of cocaine, and Forsyth gave petitioner $2,300. Pet. App. 9A-11A.

Forsyth continued to call petitioner over the next couple of weeks in an attempt to secure an even larger amount of cocaine. Petitioner agreed to furnish a half-pound of cocaine and met with Forsyth briefly at a restaurant to discuss the deal. He and Forsyth then drove to petitioner's house. Forsyth left a few minutes later on a pretext. Pet. App. 11A-12A. On December 28, petitioner, Forsyth and her "boyfriend" met at a restaurant. After petitioner checked the officers' proffered $18,000, the trio entered a car driven by George Anderson, who was introduced as petitioner's partner on the deal, drove a short distance and parked. Petitioner and Anderson showed the officers two plastic bags each containing a quarter of a pound of cocaine, and the officers tested the powder to confirm its

quality. Upon returning to the restaurant, petitioner was arrested. Pet. App. 12A-13A.

Testifying in his own defense, petitioner admitted delivery of the cocaine but contended that he was "sexually entrapped" by what he claimed he had understood as implied promises by Forsyth to have sex with him if he supplied her with cocaine. Forsyth testified that petitioner had made advances but denied any physical involvement and maintained that she had informed petitioner that their meetings were "strictly business." See IV Tr. 106, 141, 143, 145, 150-151, 153-155, 166-169, 173.

2. On appeal, petitioner challenged the denial of his pretrial motion to dismiss the indictment. That motion was based on alleged discrimination against blacks and women in the selection of federal grand jury foremen in the district in which he was indicted, which, he claimed, denied him the equal protection of the laws. Petitioner's claim rested upon a stipulation that 18 of the 22 federal grand jury forepersons selected in the judicial district over the preceding seven years were white males. The government sought to rebut any inference of discrimination with the affidavit of the district judge who had appointed the foreperson of the grand jury that had indicted petitioner, which indicated that the appointing judge had not taken race or sex into account either in that appointment or in any of the others he had made. While questioning petitioner's standing, as a white male, to raise the discrimination claim, the district court reached the merits, ruling that the position of federal grand jury foreperson is ministerial and that discrimination in this context would not warrant dismissal of the indictment (Pet. App. 34A-36A). The district court ruled in the alternative that any prima facie case of discrimination had been rebutted (*id.* at 37A-39A).

The court of appeals found it unnecessary to reach the merits, ruling instead, in conformity with its decision in *United States* v. *Cronn*, 717 F.2d 164 (1983), cert. denied, No. 83-979 (July 5, 1984), that petitioner lacked standing to raise an equal protection claim (Pet. App. 16A-17A). The court of appeals declined to consider a due process challenge to the foreperson selection process, observing that, like the defendant in *Cronn*, petitioner had not raised any due process issue in the district court (Pet. App. 17A-18A n.4).

Petitioner also argued on appeal that the district court had improperly excluded testimony from a psychiatrist and a clinical psychologist who would have testified that he was particularly susceptible to sexual enticement. The district court had ruled that the proffered testimony related to a mental disease or defect and excluded it under Fed. R. Crim. P. 12.2(b), because petitioner had failed to provide proper advance notice. Petitioner conceded that he had not provided notice of his intention to introduce expert testimony, but he argued that because the expert testimony related only to whether or not he was especially vulnerable to entrapment, Rule 12.2(b) was not applicable. The court of appeals declined to decide whether the district court had properly applied Rule 12.2(b) (Pet. App. 19A). Instead, invoking the concurrent sentence doctrine and finding that there was no credible evidence of sexual entrapment as to the penultimate sale of cocaine by petitioner, which was the basis for the conviction on count 4, the court of appeals affirmed only petitioner's conviction on that count, vacating petitioner's conviction on the remaining two counts (Pet. App. 19A-23A).

ARGUMENT

1. Petitioner challenges (Pet. 11-20) the district court's ruling that, as a white male, he lacked standing to seek dismissal of his indictment based on allegations of discrimination against blacks and women in the selection of grand

jury forepersons. Petitioner appears to argue both that he has standing to present an equal protection challenge and that, contrary to the court of appeals' reading of the record, he also presented a due process challenge. These contentions do not warrant further review.

Petitioner's contentions are identical to those raised in *Cronn* v. *United States,* cert. denied, No. 83-979, (July 5, 1984). For the reasons stated in our Brief in Opposition in that case, the court of appeals' standing ruling is correct, and there is no reason to review the fact-bound question whether the court of appeals mistook the gravamen of the claim petitioner presented in the district court.[2] In any event, this Court's decision in *Hobby* v. *United States,* No. 82-2140 (July 2, 1984), strongly supports the court of appeals' ruling on the standing issue as to any equal protection claim. See slip op. 7-8. *Hobby* also establishes that petitioner could in no event have prevailed upon any due process claim. Accordingly, certiorari should be denied here, just as it was in *Cronn* subsequent to the decision in *Hobby*.

2. Petitioner argues (Pet. 20-38) that the district court's exclusion of testimony by two mental health professionals about his alleged special susceptibility to sexual enticement violated his due process right to offer relevant evidence in his defense. Petitioner contends that the district court improperly relied upon Fed. R. Crim. P. 12.2(b) in excluding the testimony because of his failure to give proper notice. He argues that his entrapment defense and his "special vulnerability" argument were not intended to negate the mental state required for the offense charged and that accordingly, under the language of Rule 12.2(b) as it stood at the time of his trial, he was not required to give advance

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[2]Petitioner's counsel represented the petitioner in *Cronn* as well.

notice of his intent to utilize expert psychological testimony.[3] Petitioner also takes issue with the court of appeals' conclusion (Pet. App. 21A-22A) that there was no evidence of sexual inducement bearing on count 4 and that exclusion of expert testimony as to that count was therefore proper in any event. The court of appeals correctly rejected petitioner's arguments.

As petitioner recognizes (Pet. 33), Rule 12.2(b) was amended subsequent to his trial to make clear that expert testimony on psychological susceptibility to entrapment is within the rule's notice requirement. Prior to the amendment, it was unclear whether the notice requirement applied to situations in which expert testimony about a defendant's mental condition was offered on novel theories of relevance. Compare *United States* v. *Hill*, 655 F.2d 512 (3d Cir. 1981), and *United States* v. *Webb*, 625 F.2d 709 (5th Cir. 1980), with *United States* v. *Perl*, 584 F.2d 1316 (4th Cir. 1978), *United States* v. *Olson*, 576 F.2d 1267 (8th Cir. 1978), and *United States* v. *Staggs*, 553 F.2d 1073 (7th Cir. 1977). Because the notice question has recently been resolved by a clarifying amendment to the rule, and because

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[3]Rule 12.2(b) as it stood at the time of petitioner's trial provided in pertinent part:

> **(b) Mental Disease or Defect Inconsistent with the Mental Element Required for the Offense Charged.** If a defendant intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether he had the mental state required for the offense charged, he shall * * * notify the attorney for the government * * *.

Rule 12.2(b) (as amended Apr. 28, 1983 and effective Aug. 1, ~~983~~ 1983 presently provides:

> **(b) Expert Testimony of Defendant's Mental Condition.** If a defendant intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing upon the issue of his guilt, he shall * * * notify the attorney for the government * * *.

the court of appeals did not even pass on the issue, there is no occasion for this Court to give a definitive interpretation of the language of the now obsolete version of Rule 12.2(b).

There is in any event no reason for this Court to resolve the fact-bound dispute between petitioner and the court of appeals as to whether there was sufficient evidence of entrapment with respect to count 4 of the indictment (upon which his conviction was sustained) to require the court to reach the question whether advance notice of the proffered expert testimony was necessary. Because the male undercover agent, introduced to petitioner as the female agent's "boyfriend," was an active participant in the transaction that was the basis for count 4 (see page 3, *supra*), any claim of entrapment based on implied sexual promises is, in this context, wholly incredible.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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